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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 241

PAUL CHING-SZU CHEN,
Petitioner,

v.

R. WILLIAM FOLEY,
District Director of Immigration
and Naturalization Service of the
United States Department of Justice,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Dr. Paul Ching-Szu Chen prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on December 8, 1967.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Tennessee, Western Division, is not reported. The opinion of the Court of Appeals for the Sixth Circuit is reported in 385 F. 2d 929 (1967). This opinion is appended hereto as Appendix A. The opinion of the Board of Immigration Appeals dated February 24, 1967 is also appended as Appendix B.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on December 8, 1967, and a Petition to Rehear was duly filed, following which an Order was entered on January 31, 1968, denying said Petition for Rehearing. An Order was entered on April 19, 1968, granting an extension of time to June 29, 1968, within which to petition for certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying the petitioner's application for adjustment of status under § 245 of the Immigration and Nationality Act (8 U.S.C. 1255) as amended, from non-immigrant to immigrant status because of the petitioner's profession as a college professor and head of an academic department.

STATUTE INVOLVED

The statute which is involved in this case is § 245 of the Immigration and Nationality Act, being 8 U.S.C. § 1255 copied below.

> § *1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence; record; natives of contiguous country or adjacent island.*
>
> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
>
> (b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment or status is made, and the Secretary of State shall reduce by one the quota of the quota area to which the alien is chargeable under section 1152 of this title for the fiscal year current at the time such adjustment is made.
>
> (c) The provisions of this section shall not be applicable to any alien who is a native of any country contiguous to the United States, or of any adjacent island named in section 1101 (b) (5) of this title. (June 27,

1952, ch. 477, title II, ch. 5, § 245, 66 Stat. 217; Aug. 21, 1958, Pub. L. 85-700, § 1, 72 Stat. 699; July 14, 1960, Pub. L. 86-648, § 10, 74 Stat. 505.)

STATEMENT

This petition seeks to bring to this Court for review an adverse decision of the Board of Immigration Appeals (hereinafter sometimes referred to as "Board") which was affirmed by the Court of Appeals for the Sixth Circuit.

The case was originally filed in the United States District Court for the Western District of Tennessee as a habeas corpus action under the provisions of 8 U.S.C. 1105(b) seeking a stay of deportation. The District Court upheld the Board's order denying an adjustment and an appeal was brought to the Court of Appeals. While the appeal was pending, an amendment to the Immigration and Nationality Act ("Act") made it possible for the petitioner to seek another adjustment of status under the provisions of 8 U.S.C. 1255. With the approval of the Court of Appeals, the appeal was held in abeyance to permit the petitioner to seek relief administratively. The Special Inquiry Officer and the Board denied adjustment of status. The Court of Appeals then acted on the original appeal from the District Court and also treated the case as a petition to review a final order of deportation under 8 U.S.C. 1105 (a) and affirmed the Board which denied an adjustment of the petitioner's status from non-immigrant to immigrant under the provisions of 8 U.S.C. 1152 which grants a preference to members of the professions such as Dr. Chen.

Petitioner is 61 years of age and is a native and citizen of China. He is married and the father of eight children,

all living in the Philippines. The petitioner has been living apart from his family since 1961 when he entered the United States.

Dr. Chen is a person of considerable formal education. He received the degree of Doctor of Medicine in 1932 from Peiking Medical College, Peiking, China. He also received residency training in psychiatry at Peiping Municipal Psychopathic Hospital in Shanghai St. Luke Hospital. The petitioner first came to the United States in 1935 for graduate study at Cornell, Chicago and Northwestern Universities, and earned the M.A. and M.S. degrees. In 1940 he was awarded the Doctor of Philosophy degree from the State University of Iowa.

Upon completing his advanced education, Dr. Chen could not return to his native China to teach because of the Japanese blockade and occupation. Consequently, he went to the Philippine Islands to teach at the University of the Philippines. Following the attack on Pearl Harbor, he enlisted in the United States Armed Forces and reached the rank of Lieutenant Colonel having served with distinction against the Japanese. He was awarded the Distinguished Service Medal. Dr. Chen also served as officer in charge of Chinese Affairs, Counter Intelligence Corps of the U. S. Army, and was Chief Chinese Investigator for the Commonwealth of the Philippines as well as the Free Philippines during World War II.

Petitioner entered the United States on May 24, 1961 with a non-immigrant visa issued in Tokyo, Japan and was eligible to stay until November 23, 1961. Prior to Dr. Chen's entering the United States as a tourist, Dr. E. Clayton Calhoun, President of Paine College, Augusta, Georgia, on December 10, 1960, had requested the Immigration and Naturalization Service to grant Dr. Chen an

immigrant visa under the provisions of 8 U.S.C. 1153 (a)(1)(A). On January 27, 1961, four months prior to his entry as a visitor, the Immigration and Naturalization Service notified Dr. Calhoun that the petition had been approved and was being forwarded to the American Consul in Manila, Philippines. Dr. Chen did not at that time apply for this immigrant visa, preferring to visit the United States and other countries to lecture and observe educational matters related to his profession. Following his arrival in the United States, Dr. Chen was contacted by Paine College which had filed the above mentioned petition on his behalf. Paine College, a small, Negro, church-supported school in Augusta, Georgia, prevailed upon Dr. Chen to accept employment at the College as a teacher and counselor during the school year ending in June, 1962. Shortly after accepting employment, Dr. Chen was advised by the Immigration and Naturalization Service that his stay as a non-immigrant would be extended until January 26, 1962, the expiration date of the original visa petition filed on his behalf by Paine College. The Service further advised that the College could file another revalidation petition on his behalf to extend his stay yearly until his Chinese preferential quota number was reached. Paine College was impressed with Dr. Chen's ability as a professor, and accordingly on November 10, 1961, requested revalidation of his visa petition. The enthusiasm of Paine College for Dr. Chen continued, and on May 31, 1962, the parties entered into a new contract whereby petitioner agreed to continue as Professor of Social Sciences for the school year ending May 31, 1963.

In the spring of 1961, prior to his entrance into the United States, Dr. Chen lectured in Japan, Hawaii, and Canada. During this period of time and prior to arriving in the United States, petitioner was advised by two relatives,

his brother-in-law and his nephew, that his wife had died of a heart attack while on a visit to her sick mother in Amoy, China. Subsequently, in December, 1961, the sad news was confirmed by Dr. Chen's sister in Amoy, China.

In January, 1962, with the information and belief that his first wife had been dead since early spring of 1961, Dr. Chen married a United States citizen, Ella Lucille Self. Shortly thereafter, she filed with the Immigration and Naturalization Service a petition seeking an adjustment of his status to a permanent resident based upon their marriage. Petitioner also wrote the Immigration and Naturalization Service, setting forth the details of his marriage and explaining his first wife's death. It is important to note at this point that Paine College's request for revalidation of petitioner's visa petition was never officially acted upon, apparently because of the new development concerning Dr. Chen's marital status.

Following the close of the school year in June, 1962, Dr. Chen visited and lectured in other parts of the country, and at the end of the summer he requested and was granted a leave of absence from Paine College. This institution which originally sponsored Dr. Chen, which had entered into teaching contracts with him, and whose president had recommended him to Senators Russell and Talmadge, apparently lost interest in him while he was on a leave of absence. Accordingly, in November, 1962, the College notified the Immigration and Naturalization Service that it would no longer represent the petitioner even though he was at that time under a valid, binding, employment contract until May 31, 1963, despite his leave of absence.

In November, 1963, the Immigration and Naturalization Service denied the application of Ella Self Chen seeking

an adjustment to immigrant status for petitioner on the ground that the death of Dr. Chen's first wife, although documented, had not been proven to the satisfaction of the Service. Subsequent investigation by the Service indicated that the petitioner's Chinese wife, Go Po Guioc, was alive and living in the Philippines. Upon learning this fact, the marriage was immediately annulled.

On February 15, 1963, petitioner was notified that he would be required to depart from the United States within one month. When he failed to leave on March 20, 1963, an order was issued requiring him to show cause why he should not be deported. Hearings by the Service were commenced on April 1, 1963, and continued for approximately one year.

During the early stages of the hearing, petitioner was allowed another application for adjustment of status based upon a 1962 amendment of the Act. Under the new amendment, certain aliens were afforded non-quota status, if among other things they were on April 1, 1962, the beneficiary of an approved visa petition and if they were at the time of application for adjustment of status found to have retained their status as established in the approved petition. However, the examiner denied Dr. Chen's application for adjustment of status under Section 245 of the Act and found Dr. Chen to be in this country unlawfully and granted voluntary departure. On appeal the Board affirmed but directed deportation.

At about the time that the Board ruled, petitioner contracted with Rust College, Holly Springs, Mississippi, to teach at that institution through June 1, 1965. In September, 1964, Rust College filed with the Immigration and Naturalization Service a preference petition for immigrant status on behalf of petitioner. No action was taken on this

petition, and on June 8, 1965, immediately following the school year, petitioner was served with notice to surrender himself at Memphis, Tennessee within three days for deportation to Formosa. On June 10, 1965, petitioner filed a habeas corpus action in the United States District Court for the Western District of Tennessee. On August 13, 1965, the District Court rendered its decision affirming the Board's denial of adjustment of status and dismissing the petition. Subsequently, the petitioner was notified that he had until September 26, 1965 to depart voluntarily, and upon failure to do so he would again be subject to deportation. On September 30, 1965, the preference petition filed by Rust College was denied and the petitioner appealed from all actions to the Sixth Circuit Court of Appeals.

While the appeal was pending, Congress enacted Public Law 89-236 which became effective October 3, 1965. This law, 8 U.S.C. § 1153 (a)(3) allocated third preference visas "to qualified immigrants who are members of the professions or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." The importance of this amendment was that "professionals" automatically qualified for immigrant visas to the extent of their availability within the third preference group. It appeared that the change in the law might make an immigrant visa more readily available to petitioner, thereby removing the basis for the Board's denial of his most recent application for adjustment of status. Accordingly, Rust College filed a petition for a third preference visa under the provisions of the new law, which petition was granted. Subsequently, petitioner was notified that he again might apply for adjustment of status under Section 245 of the Immigration

and Nationality Act from non-immigrant status to immigrant status. The Court of Appeals granted the petitioner leave to pursue this approach and held the appeal in abeyance. The latest application for adjustment of status was considered by a Special Inquiry Officer who denied petitioner's application for adjustment and ordered him deported. Petitioner then appealed to the Board of Immigration Appeals. The Board rendered its decision on February 24, 1967, affirming the holding of the Special Inquiry Officer and denying petitioner's application for adjustment of status. However, the Board did grant petitioner the right of voluntary departure. Subsequently, the entire matter was heard in the United States Court of Appeals for the Sixth Circuit, and on December 8, 1967, the decision of the Board denying relief under Section 245 of the Immigration and Nationality Act was affirmed. On January 31, 1968, Dr. Chen's Petition for Rehearing was denied.

At present, the petitioner is employed as the Chairman of the Department of Psychology of Knoxville College, Knoxville, Tennessee, which is a small, church-supported, Negro school with an enrollment of 900 students. This institution filed a petition on August 23, 1967, seeking a preferential visa for Dr. Chen which was granted by the Service, valid until August 22, 1968. The visa petition gives Dr. Chen a third preference beneficiary status based upon his professional qualifications. (See Appendix C)

Since Dr. Chen's arrival in this country, he has devoted himself to serving the needs of higher education among the small and impoverished Negro colleges of the South. His educational achievements, his Ph.D. degree, and valuable experiences help to enable these schools to

meet minimum accreditation requirements. His valued service to education and to this country should be recognized by this Court.

REASONS FOR GRANTING WRIT

The Writ of Certiorari should be granted in order to review the proceedings to date which direct the deportation of the petitioner and deprive the United States and Knoxville College of a worthwhile and devoted servant.

The petitioner asserts that there has been an abuse of discretion by the Board of Immigration Appeals which has been overlooked by the Circuit Court and which deserves further consideration by this Court. The exercise of discretion calls for an intelligent appraisal of all the well-proven facts, an understanding of the applicable law, and a reasoned determination. It is urged that the facts of this case require a full hearing before this Court and a reversal of the decisions of the lower courts.

The petitioner recognizes that this Court has been reluctant to consider these cases in the past. However, he feels that this case is most meritorious and cries out for equitable relief. It is his fervent hope that this Court having the issue narrowed to the question of discretion can address itself more dispassionately and in a more understanding way to this problem than could the lower courts which were burdened with a compound of administrative rulings, changes in the law itself, time delays, and limited judicial review. This Court exercising its supervisory powers over the lower federal courts and being aware of the burdensome case load and variety of cases presented to the lower courts can recognize that a case of this kind can readily be lost in the quantity and maze of other judicial activities.

The issue when narrowed to its flesh and bones is whether the petitioner will continue to live in the United States and to serve the cause of education and particularly church-supported Negro colleges in the South or whether he will be deported from our shores. Will the cry of the small Negro colleges in the South for qualified professors be heard, will it be fulfilled, or will administrative rulings fail to heed the cry? Will a man of unusual educational talents who has served this country, during World War II in the United States Army, be deported at the age of 61 after spending seven years serving this country once again, or will he be permitted to continue in his chosen profession serving the urgent needs of our young people?

The petitioner is presently employed as Chairman of the Department of Psychology at Knoxville College, in Knoxville, Tennessee. This is a church-supported institution of higher learning established to educate Negro citizens in the South. The College has made great strides in the past to broaden the service which it renders to the Negro community and to the nation at large. It is supported by the United Negro College Fund, the Presbyterian Church, and by federal and foundation grants. It desperately needs qualified educators, yet it cannot compete in the marketplace of salaries with larger private institutions and state universities. Fortunately, a few men are attracted to Knoxville College where they have an opportunity to serve the Negro community and where they are paid a fraction of what would be paid to them in other institutions. Such a man is Dr. Chen. The Knoxville community needs Knoxville College, and Knoxville College needs Dr. Chen. He has made an outstanding contribution to the College which will sorely miss him if he is denied an adjustment of status and is not permitted to continue teaching and helping to train young Negroes in Christian leadership.

THE FINDINGS OF THE IMMIGRATION AND NATURALIZATION SERVICE WHICH REQUIRE REVIEW

As a result of the change in the law to the effect that "professionals" automatically qualified for immigrant visas to the extent of their availability within the third preference group, and because Dr. Chen was then employed by Rust College, the Service advised the petitioner that he could reopen his case and file for an adjustment of status in view of the amendment to the Act. Upon proper motion to the Sixth Circuit Court of Appeals before whom the appeal was pending, this proceeding was allowed, and the case was held in abeyance pending the outcome of the administrative hearing.

A hearing was conducted by a Special Inquiry Officer who denied adjustment of status as a matter of discretion and ordered Dr. Chen deported. This decision was based upon two grounds, the first being his concurrence with the Board of Immigration Appeals' findings of August 21, 1964 to the effect that the petitioner's alleged bigamous marriage showed a lack of good moral character to satisfy the statutory requirement of establishing good moral character for five years. The second ground was that the function of the immigration laws was to keep the family unit together and inasmuch as Dr. Chen's immediate family was and had been living in the Philippine Islands, it had not been demonstrated that an adjustment of status would accomplish this purpose.

The Board by its Order filed on February 24, 1967, affirmed the denial of adjustment of status but held that the Hearing Officer erred in his first reason for denial based upon the alleged bigamous marriage. The Board held that the decision of the United States District Court

to the effect that the petitioner was not guilty of "conscious fraud" when he contracted his second marriage was binding and, therefore, was not a bar to a finding that the petitioner was a person of good moral character.

The Board thus sustained the Special Inquiry Officer as to the second ground, keeping the family unit together and noted as an additional ground that it doubted whether the petitioner's entry to this country as a visitor was bona fide because of his subsequent attempts to achieve immigrant status.

KEEPING THE FAMILY UNIT TOGETHER

Keeping a family unit together may well be a worthwhile goal but it should not be a basis for a legal denial of adjustment of status of an immigrant. Our history is full of stories of immigration of a father, followed years later by his wife and children. To say that Dr. Chen's family will be a better family unit assumes a great deal by the trier of facts without sufficient evidence. Why should the Immigration Service be really concerned about keeping a family unit together when the family may not have lived together in its country of origin? Why should the Service conclude that the family should immigrate together or that it should not immigrate at all? On the contrary, the Service should recognize that the law and the Service in carrying out the law have consistently discriminated against Orientals, and the separation of Oriental families was a way of life because of the law. Dr. Chen having gained admission to this country may desire to bring his family here to join him rather than returning to the Philippines to join them. Has this been considered by the Board of Immigration Appeals? There is an absence of any such thought or discussion in the opinion of the Board of Immigration Appeals.

Rather than conclude that the object of the Act is to keep families together, the Board should have concluded that the object of the Act is now a most selfish one with reference to professionals, namely, that they should be afforded special status to teach in our institutions and to assist this country. This is the objective to which the Board should have addressed itself and not the condition of family life in the Philippines or any other country.

Although there is language to the effect that an adjustment of status circumvents ordinary immigration procedures and will only be granted in meritorious cases, to determine those meritorious cases requires an obligation to comply with the tenor and requirements of the immigration laws, which have been amended and liberalized to meet changing needs. The laws today clearly call for special treatment to professionals and to avoid that, is to abuse the law and to abuse discretion. The immigration laws are silent about maintaining a family unit in a foreign country and to place emphasis or pay allegiance to that is to violate the existing law. These abuses are present and require due consideration and correction by this Court.

The Board and the Special Inquiry Officer have permitted themselves to speculate as to the status of Dr. Chen's family without adequate evidence in the record as to their true relationship. Although the Immigration Service found Mrs. Chen alive in the Philippines, it did not file a deposition or an affidavit as to what she actually stated. There was no opportunity for cross-examination to determine the veracity of the statements of the Immigration Service officer in the Philippines. No effort was made nor has any evidence been presented to show a difference in the costs of living in the Philippines and in the United States and to demonstrate that the sums that were being sent to the Philippines by Dr. Chen were substantial

sums in terms of the Philippine economy and dollar exchange rates. The Appeal Board states, "There is no evidence before us that the respondent is in a position to finance the immediate passage of a family of eight from the Philippines to the United States." It is submitted that very few persons are in a position to *finance the immediate passage of a family of eight from the Philippines* or from any other country for that matter. It takes time, savings, patience and effort, and this cannot be accomplished immediately as the Appeal Board seems to indicate. Dr. Chen's salary has not been too substantial, but he has provided sufficient support for his family. It may well be that the family is happier growing up in the Philippines than it would be in the United States and to judge an Oriental family life by Caucasian standards is neither fair nor appropriate and in a sense is discriminatory in failing to recognize other mores and ways of life.

The Board inferred a number of things in its opinion which are referred to in the opinion of the Court of Appeals, but the primary ground for denying adjustment of status appears to be Dr. Chen's separation from his family in the Philippines. It is submitted that the Board could have found that Dr. Chen had in fact provided support for his family, that he does wish to bring his family to this country, and would do so when he is granted permanent resident status. Rather than expel Dr. Chen the Board should recognize his professional services which give him preferential treatment under the Act and proceed to adjust his status and reunite the family.

ENTRANCE INTO THE UNITED STATES

The Board of Immigration Appeals asserted that it had doubts as to whether the petitioner entered the country as

a bona fide non-immigrant. They noted that in previous rulings they had held "that a preconceived intent to establish permanent residence via the non-immigrant route . . . is a factor to be considered in denying relief under Section 245 of the Immigration and Naturalization Act."

It should be noted as found by the Circuit Court that on December 10, 1960, the President of Paine College, another small Negro institution located in Augusta, Georgia, requested the Immigration and Naturalization Service to grant Dr. Chen an immigrant visa under the provisions of Section 203 (a)(1)(A) of the Act, 8 U.S.C. § 1153 (a)(1)(A). Pursuant to this request, on January 27, 1961, the President of Paine College was notified that the petition had been approved and that it had been forwarded to the American Consul in Manila, Philippines, where Dr. Chen could make application for his visa. Rather than applying for that visa, the petitioner, on May 4, 1961, applied for and received a non-immigrant visa in Tokyo, Japan, permitting him to enter the United States and upon admission he was permitted to stay until November 23, 1961 for lecturing and observation purposes. While Dr. Chen was visiting various educational institutions he was again requested to teach at Paine College. Permission to teach was granted him by the late W. N. Owens, District Director of the I. N. S. in Atlanta, Georgia. He accepted the teaching assignment and after being here and recognizing the need for his talent, he decided that he would continue to teach in this country. Accordingly, he served at several other Negro colleges in the South upon their insistent and urgent requests, and would like very much to remain here working at his chosen profession. Pragmatically one may reason that he was honest in not accepting immigrant status when he came to this country because he had some doubt as to whether

he wished to be an immigrant or not. After visiting the United States and after serving educational institutions here and receiving many offers of responsible educational positions, he then decided that it would be appropriate to remain in this country and to teach, whatever his immigration status might be called. The 1965 Amendment to the Immigration and Nationality Act by affording preferential treatment to special immigrants engaged in education encourages this kind of a response and it should be recognized.

This case is not unlike *Brownell v. Stjepan Bozo Carija*, 254 F. 2d 78 (C.A. D.C. 1957) where persons from Yugoslavia were traveling through the United States to Paraguay on non-immigrant visas when the Displaced Persons Act was adopted. The Act permitted the defendants to seek adjustment of status to that of residents. The application for adjustment was denied by the Attorney General solely upon a finding that upon their entry into the United States they possessed an intention to remain permanently and, therefore, their entry was unlawful. The Court of Appeals reversed, holding that an intention to remain permanently in this country if the laws permit this does not render the entry unlawful. Making use of an opportunity to remain here because of a change in laws does not smack of unlawful conduct or preconceived intent.

So it is with Dr. Chen. A change in our national policy with reference to professionals makes it possible for Dr. Chen to apply for permanent resident status. The law has changed and the petitioner seeks to comply with the law by obtaining an adjustment of his status under § 245 of the Act (8 U.S.C. 1255) to that of a permanent resident under the preferential treatment afforded educators by Public Laws 87-885 and 89-236. [8 U.S.C. 1153 (a)(3)]

CONCLUSION

The petitioner has described herein the long and arduous road that he has traveled through administrative and judicial procedures seeking to adjust his status to that of an immigrant to these shores. He has devoted himself to teaching in small Negro church-supported colleges in the South in an effort to assist this needy and deprived minority. He served this country in World War II, and he has served it again during the past seven years under difficult circumstances. He has been harassed, threatened and maligned by those persons in Mississippi and Georgia who resented his devotion to Negro education yet he has persevered and has continued to serve this nation. He is exhausted. This is his final avenue of relief. If this door is closed and his petition for certiorari rejected, he will undoubtedly be deported. The loss will be the greatest to the Negro youngsters that he teaches, the school that he serves, the field of higher education, and the United States. After more than seven years of continued services, this 61 year-old-petitioner seeks only to live out his days educating the less fortunate among us.

WHEREFORE the petitioner prays that this petition for certiorari be granted.

Respectfully submitted,

.....

BERNARD E. BERNSTEIN
Bernstein & Dougherty
1200 Hamilton National Bank Building
Knoxville, Tennessee 37902

Date: June 19, 1968

AFFIDAVIT OF SERVICE

I, Bernard E. Bernstein, Counsel for the Petitioner, being first duly sworn according to law, depose and say:

That I have on the ..... day of June, 1968, caused to be served true and exact copies of the foregoing petition for a writ of certiorari upon counsel as listed below by depositing same in the United States mail with postage prepaid addressed to counsel at their respective addresses.

.....
BERNARD E. BERNSTEIN

Sworn and subscribed to before
me this ..... day of June, 1968.

.....
Notary Public

My Commission Expires: .....

Mr. Thomas L. Robinson
United States Attorney
Federal Building
Memphis, Tennessee

Solicitor General
Department of Justice
Washington, D. C.

APPENDIX "A"

NO. 16,988

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PAUL CHING-SZU CHEN,
Petitioner-Appellant,

R. WILLIAM FOLEY, District Director of Immigration and Naturalization Service of United States Department of Justice, et al,
Respondents-Appellees.

APPEAL from United States District Court for the Western District of Tennessee, Western Division.

Decided December 8, 1967

Before Weick, Chief Judge, Edwards, Circuit Judge, and Cecil, Senior Circuit Judge.

Weick, Chief Judge. As now constituted, this is a proceeding to review an adverse decision of the Board of Immigration Appeals, denying on discretionary grounds the petition of Paul Ching-Szu Chen, an alien, under Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255 (Supp. 1966),[1] and directing his deportation. Be-

[1] Section 1255 provides in part, "(a) The status of an alien, . . . who was . . . admitted . . . into the United States may be adjusted by the Attorney General, in his discretion . . . to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

cause the issues are now entirely different than those originally presented in the appeal, the history of
[2] this case will be reviewed in detail.[2]

Petitioner is a native and citizen of China. He was born on June 23, 1907. He is married to Go Po Guioc and is the father of eight children, ranging in age from thirteen to twenty-five years, but he has been living apart from his family continuously since 1961. He is a person of considerable formal education, a portion of which was obtained in this country prior to the occurrences hereinafter related.[3]

Under date of December 10, 1960, E. Clayton Calhoun, President of Paine College, Augusta, Georgia, requested the Immigration and Naturalization Service to grant

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[2] The appeal originally was from an order of the District Court entered in a habeas corpus proceeding upholding the Board's order denying Chen's application for adjustment of his status to that of a permanent resident on the ground that he failed to meet the statutory requirements to entitle him to that relief and ordering his deportation. During the pendency of the appeal, additional administrative proceedings intervened, which resulted in a second deportation order based on the same grounds as the first one, and a second administrative decision denying Chen's application for adjustment of his status to that of a permanent resident, which denial was based on discretionary grounds rather than failure to meet statutory requirements. Supplemental records of the new administrative proceeding have been filed in this Court. We will therefore treat the papers as a petition to review a final order of deportation under Section 106(a) of the Act. 8 U.S.C. 1105a(a).

[3] Petitioner holds the following degrees: B.A. and M.A. degrees from the National University of Amoy; M.D. degree from the Peking Union Medical College; M.A. degree from Northwestern University; and Ph.D. degree from State University of Iowa.

petitioner an immigrant visa under the provisions of. Section 203(a)(1)(A) of the Act, 8 U.S.C § 1153(a)(I)(A).[4] On January 27, 1961, the Service notified Mr. Calhoun that the petition had been approved and was being
[3] forwarded to the American Consulate in Manila, Philippines, where petitioner could make application for the visa. However, petitioner never applied for this visa but instead, on May 4, 1961, he applied for and received a nonimmigrant B-2 visa in Tokyo, Japan. The visa was issued allegedly so that petitioner could sight-see in Honolulu, Hawaii, for three weeks."

Petitioner actually entered the United States on May 24, 1961, at Seattle, Washington, as a nonimmigrant and eligible to stay only until November 23, 1961, but he has remained here ever since. Soon after his entry petitioner was employed by Paine College. Shortly before the expiration date of his authorized stay, he was notified by the Service that his employment would prohibit them from extending his stay as a nonimmigrant, but that Paine College, if they wished to do so, could file another first preference petition pursuant to Section 203(a)(1)(A). The letter also informed Chen that his authorized stay would be extended until January 26, 1962, the expiration date of the original petition filed on his behalf by Paine College.

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4 As it then read, the section provided:

"(a) Immigrant visas to quota immigrants shall be alloted in each fiscal year as follows:

(1) The first 50 per centum of the quota of each quota area for such year, plus any portion of such quota not required for the issuance of immigrant visas to the classes specified in paragraphs (2) and (3) of this subsection, shall be made available for the issuance of immigrant visas (A) to qualified quota immigrants whose services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the United States . . . ."

On November 10, 1962, Paine requested revalidation of petitioner's visa petition. Prior to this date but subsequent to his arrival in this country, petitioner had been advised by letters from friends and relatives abroad that his wife, while on a trip to visit her sick mother in China, had died of a heart attack.

On January 1, 1962, petitioner married Ella Lucille Self, a thirty-year old native born United States citizen, who had been previously married and divorced. He immediately filed a petition for adjustment of status to permanent resident alien, using as grounds therefor his marriage and the subsequent visa petition filed on his behalf by Ella Lucille Self Chen. Paine College's revalidation request was never acted upon, and although the record is not entirely clear, the reason seems to have been that in view of petitioner's apparent qualification for nonquota status, the revalidation of a first
[4] preference petition was no longer necessary.

Ella Lucille Self Chen at some undisclosed later date withdrew her petition, but reinstated it by means of a letter to the Service under date of January 23, 1963. On November 22, 1963, her petition was denied on the ground that she had failed to provide adequate proof of the termination of Chen's prior marriage.[5] No appeal was taken from the denial of this petition.

On November 23, 1962, Paine College notified the Service that petitioner was no longer employed by it and that the College did not wish to sponsor him further in

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[5] Chen's first wife, Go Po Gujoc, upon investigation by the Service, was found to be very much alive, living in the Philippines where he left her and their children in 1961. When Chen's American wife learned of this fact, she obtained an annulment of their marriage in Mississippi. They had never lived together as husband and wife.

any action before the Service. Accordingly, on February 15, 1963, petitioner was notified in writing that he would be required to depart from the United States within one month. When he failed to leave the country on March 20, 1963, an order was issued requiring him to show cause why he should not be deported. 8 U.S.C. § 1251(a)(2).[6]

Hearings were commenced on April 1, 1963, and concluded one year later. During the early stages of the hearing petitioner was allowed to file another application for adjustment, based upon a 1962 amendment of the Act.[7] By the provisions of this amendment, certain aliens were accorded nonquota status if among other things they were on April 1, 1962, the beneficiary of an approved visa petition and if they were at the time of application for adjustment of status found to have retained their status as established in the approved petition. The Special

[5] Examiner found that the petitioner had not actively engaged in teaching at Paine College since June, 1962. That fact coupled with the information that the College neither considered petitioner to be employed by them nor did they have any interest in representing him before the Service, led the Examiner to conclude that petitioner had not at the time of his application for adjustment maintained first preference status. Therefore the Examiner held:

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[6] Sec. 1251(a)(3) provides:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who . . . (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States. . . "

[7] Public Law 87-885, Section 2, 76 Stat. 1247.

'". . . he [petitioner] is not entitled to the benefits of Section 2 of Public Law 87-885. He has not established that an immigrant visa is immediately available to him since he is chargeable to an oversubscribed quota. Accordingly, his application for adjustment of status under Section 245 will be denied."

The Examiner found petitioner to be in this country unlawfully but granted voluntary departure. On appeal the Board affirmed, except it ordered deportation.

Almost contemporaneously with the Board's decree, Chen entered into a contract with Rust College, Holly Springs, Mississippi, by the terms of which he agreed to teach at that institution through June 1, 1965. On September 12, 1964, Dr. Earnest A. Smith, President of Rust College, filed with the Service a first preference petition on behalf of Chen. No action was taken on this petition, and on June 8, 1965, Chen was served with notice to surrender himself at Memphis, Tennessee, within three days, for deportation to Formosa.

On June 10, 1965, Chen filed a habeas corpus action in the United States District Court for the Western District of Tennessee. A stay of deportation was granted pending a hearing on the merits. On August 13, 1965, the District Court rendered its decision affirming the Board's denial of adjustment of status but reinstating the Examiner's allowance of voluntary departure. Approximately two weeks later petitioner was notified by the Service that he had until September 26, 1965; to depart voluntarily, but upon failure to do so he would be
[6] subject to deportation. On September 30, 1965, the first preference petition filed by Rust College was denied. An appeal to this Court followed.

But that is not the present posture of the case. While the appeal was pending the statutory provisions controlling the instant case were substantially amended by Congress.[8] The amendment to Section 203 significantly rearranged the preferences and also altered the prerequisites of some of the old classifications.[9] The change which was crucial to the instant case was that "professionals"[10] automatically qualified for immigrant visas to the extent of their availability within the third preference group.

It appeared therefore that under the new law an immigrant visa might be more readily available to Chen, thereby removing the basis for the Board's denial of his most recent application for adjustment of status.

While this appeal was pending, Rust College, seeking to take advantage of the changes made by the amendment, initiated a third preference petition on behalf of Chen. The petition was granted and Chen was advised that he could now move for the reopening of his case and again file for adjustment of status, to be considered in the light of the recent amendment. Motion to reopen was made and granted, subject to the approval of this Court.

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[8] Public Law 89-236, section 3. 79 Stat. 912.

[9] The amended section 203 provided in pertinent part:

"(a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows: . . . (3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a)(ii) of this title, to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States . . . ."

[10] 8 U.S.C. § 1101(a)(32) (Supp. 1966) provides:

"The term 'profession' shall include but not be limited to . . . teachers in the elementary or secondary schools, colleges, academies, or seminaries.

[7] On the representation of the parties that further administrative proceedings might render the questions in the pending appeal moot, the Court entered orders on April 1 and June 27, 1966, allowing the appeal to be held in abeyance until completion of the planned administrative hearings.

The special inquiry officer's decision following the reopened hearing, denied adjustment as a matter of discretion and ordered Chen deported. The decision was based on two grounds, only the second of which need be considered here inasmuch as the first was not adopted by the Board. The second ground was that it is the function of the immigration laws to keep the family unit together, and inasmuch as Chen's immediate family was and had been living in the Philippine Islands, it had not been demonstrated that allowance of adjustment of his status would accomplish this purpose. The Board, in affirming, adopted the reasoning of the Examiner and adopted additional grounds for denying discretionary relief. Voluntary departure was allowed.

Although it has been necessary to recite a large number of facts and issues in order to place the case in its proper prospective, the issue for consideration by the Court at this time is in fact a very narrow one. The only question before this Court is whether the Board in its decision of February 24, 1967, denying Chen adjustment of status under Section 245 of the Act, abused its discretion. The questions presented by the initial appeal have become moot.

Section 245 of the Act is composed of two phases, the first of which enumerates certain objective requirements which an alien must meet in order to qualify for adjust-

ment of status, and the second of which calls for the exercise of discretion by the Attorney General. In all of the proceedings involved in the original appeal, Chen was adjudged to have failed to satisfy one of the requirements of part one of Section 245. No discretion had been involved.

During the reopened proceeding Chen was the beneficiary of an approved third preference visa, and as such he thereby satisfied the objective requirements of
[8] the amended section. Relief was denied as a matter of discretion. The only relief which this Court could have awarded in the first appeal would have been to require the Board to exercise the discretion that it exercised in its latest decision.

The relief sought by Chen is by the very terms of the statute committed to the discretion of the Attorney General. In an appeal of this type the reviewing court is limited to an examination of the record to ascertain if that discretion has been abused. The Court may not substitute its judgment for that of the administrative agency. *Foti v. Immigration & Naturalization Service*, 375 U.S. 217 (1963); *Kassab v. Immigration & Naturalization Service*, 364 F.2d 806 (6th Cir. 1966); *Cubillos-Gonzalez v. Immigration & Naturalization Service*, 352 F.2d 782 (9th Cir. 1965).

As pointed out earlier, Section 245 contains certain objective prerequisites which must be met before the relief afforded by that section is available. Once these conditions are satisfied, then the alien has the burden of persuading the Attorney General to exercise his discretion favorably. *Tibke v. Immigration & Naturalization Service*, 335 F.2d 42 (2nd Cir. 1964).

Simply because an alien fulfills the preliminary requirements, does not mean that he will automatically be accorded adjustment of status. Because this form of relief circumvents ordinary immigration procedures, it is extraordinary and will be granted only in meritorious cases, and the burden is on the immigrant to prove that his case is meritorious. *Santos v. Immigration & Naturalization Service*, 375 F.2d 262 (9th Cir. 1967). In *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957), a case involving a petition for suspension of deportation based on hardship to a citizen, the Court said:

> ". . . [T]he statute does not contemplate that all aliens who meet the minimum legal standards will be granted suspension. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met."

Just as the Attorney General must exercise discretion in the suspension of deportation, so must he exercise his discretion in adjustment of status proceedings, and it is only in case of abuse that his decision will be overturned.

As a discussion of the administrative proceedings is undertaken, it will be observed that in addition to one of the grounds advanced by the Special Inquiry Officer, the Board based its decision on another ground. This is in conformity with the settled practice that the Board is not bound by the decision of the examiner and may determine the case de novo. *Woodby v. Immigration & Naturalization Service*, .385 U.S. 276, 278 (1966) footnote 2; *DeLucia v. Immigration & Naturalization Service*, 370 F.2d 305, 308 (7th Cir. 1966), *cert.denied* 386 U.S. 912 (1967).

The special inquiry officer, in denying relief, said:

> "The . . . reason why this application will be denied is the fact that the respondent's wife and seven of their children, five of whom are minors, presently reside in the Philippine Islands, and the function of the immigration laws is to keep the family unit together."

Petitioner insists that it was error for the Examiner to rely upon the purpose of the law "to keep the family unit together" as justification for denying relief, since petitioner argues there is nothing in the immigration laws that would preclude him from petitioning for immigration visas for his entire family once his status was adjusted to that of permanent resident alien. The Board said:

> ". . . [T]he respondent has shown little concern for his family in the Philippine Islands since his arrival in 1961. We find no evidence that he has supported his family during his residence in the United States. It is alleged that he earns a modest salary. According to the respondent's Federal income tax return
> [10] for 1963 he earned a total of $2,300. There is no evidence before us that the respondent is in a position to finance the immediate passage of a family of eight from the Philippines to the United States."

Petitioner takes the position that the Court should take judicial notice that college professors now command substantial salaries. He asserts that one of the alleged errors committed by the Special Inquiry Officer, and urged before the Board, was that the officer had failed to consider the substantial contribution that the petitioner was making to the welfare of this country by rendering his services to a small church related Negro school for

a *modest* salary, when he could have been engaged by a larger school at a far more lucrative income.

But this was not his only employment in this country. He accepted employment elsewhere and was not frank in disclosing all of his places where he did work.

Petitioner's past performance with respect to his family did not convince the Board that he would do any better in the future. When petitioner's wife was interviewed by the Service in the Philippines in 1963, she stated that he had not written to her since he had departed for the United States, a period of more than two and one-half years. Nor does the record show much concern on his part for the welfare of his minor children when he learned of the alleged death of his wife.

In further explanation of its denial of relief, the Board pointed out that there was doubt as to whether petitioner entered the country as a bona fide nonimmigrant. The Board said:

> "Furthermore, the record of the respondent's employment and his persistent efforts to adjust his immigration status raises a doubt as to the bona fides of respondent's entry as a nonimmigrant visitor for pleasure. We have consistently held that a preconceived intent to establish permanent residence via the nonimmigrant route [footnote omitted] is a [11] factor to be considered in denying relief under Section 245 of the Immigration and Naturalization Act."

In this connection see *Castillo v. Immigration & Naturalization Service*, 350 F.2d 1 (9th Cir. 1965).

In our opinion there is substantial evidence in the record to support the Board's conclusion. Prior to the

time that the petitioner entered the country, ostensibly as a nonimmigrant, a prospective employer had applied on his behalf for an immigrant visa. Ordinarily a nonimmigrant must obtain the permission of the Service before he may accept employment, and yet shortly after petitioner entered the country he began teaching, without the necessary consent. The record shows that within approximately seven months after entry, Chen married a citizen, with whom he never cohabited, and without making much of an investigation to determine whether his first wife was really dead. Five days after his record marriage, he applied for permanent residence based upon the union.

The record further reveals that on May 10, 1962 and on April 8, 1963, private bills were introduced in Congress to accord petitioner permanent residence, and that petitioner actively pursued the passage of these bills. The bills failed to pass. With this information before it, the Board was certainly warranted in inferring that Chen had entered the country with intent to stay permanently. We are unable to find that the Board abused its discretion.

The decision of the Board denying discretionary relief under Section 245 is therefore affirmed.

APPENDIX "B"

[1]

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A-1501374 - Memphis FEB 24 1967

In re: PAUL CHING-SZU CHEN

IN DEPORTATION PROCEEDINGS

APPEAL

ORAL ARGUMENT: December 28, 1966

On behalf of respondent: Rives A. Manker, Esq.
514 Union Planters Bank Bldg.,
Memphis, Tennessee 38103

On behalf of I&N Service: Irving A. Appleman
Appellate Trial Attorney

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 USC 1251 (a)(2)) - Remained longer - non-immigrant

Lodged: None

APPLICATION: Adjustment of status under Section 245 of the Immigration and Nationality Act, as amended, or in the alternative voluntary departure in lieu of deportation

The respondent, a married male alien, 59 years of age, is a native and citizen of China. He appeals from an order entered by the special inquiry officer on October 10, 1966 denying an application for adjustment of status pursuant

to Section 245 of the Immigration and Nationality Act and directing his deportation in the alternative to Venezuela, the Republic of China on Formosa and the Republic of the Philippines on the charge stated in the Order to Show Cause.

The respondent's appeal is directed to the denial of
[2] his applications for discretionary relief.

The respondent was admitted as a nonimmigrant visitor for pleasure at the port of Seattle, Washington on or about May 24, 1961. Thereafter, he was granted permission to remain in the United States until March 15, 1963. He has remained in the United States subsequent to March 15, 1963 and is deportable as charged in the Order to Show Cause.

Deportation proceedings were instituted against the respondent on March 20, 1963. We last considered the case in April of 1966. We considered on that occasion the respondent's motion to reopen the proceedings to permit reapplication for adjustment of status to that of a permanent resident alien as provided in Section 245 of the Immigration and Nationality Act. After careful consideration of the motion, we remanded the case to the special inquiry officer for this purpose, conditioned upon the Court of Appeals for the Sixth Circuit consenting thereto, as an appeal was then pending in that court.

The record relates to a Chinese alien who was a graduate student in the United States between 1935 and 1940. He was awarded a Doctor of Philosophy Degree by the State University of Iowa in 1940. After teaching for a number of years in the Republic of the Philippines he returned to the United States in May of 1961 as a nonimmigrant visitor for pleasure. The respondent accepted employment as a professor of social studies at Paine College, Atlanta, Georgia, in the spring of 1961. He has been gainfully

employed in the field of education and related fields since his entry in 1961. He is now Chairman of the Division of Education and Director of Teacher Education at Texas College, Tyler, Texas.

[3] The respondent seeks an adjustment of his status to that of a permanent resident alien. His original application for adjustment of status under the provisions of Section 245 of the Immigration and Nationality Act was submitted to the District Director at Atlanta, Georgia on January 22, 1962. The respondent deposed in his application that he was married to Ella Lucille Chen, a native-born citizen of the United States, on January 1, 1962; and that his first wife, Pauline Chen, was deceased.

The respondent was accorded a reopened hearing at Memphis, Tennessee on June 10, 1966. He deposes in an application filed pursuant to Section 245 of the Immigration and Nationality Act and sworn to on June 10, 1966 (Ex. R-1) that he has been employed since August of 1964 by Rust College at Holly Springs, Mississippi; that his wife, Go Po Ginoc, resides at Manila, Republic of the Philippines, with seven of his eight children; that one of his two marriages has been annulled; and that he is the beneficiary of a third preference visa petition submitted by Rust College of Holly Springs, Mississippi, which was approved by the District Director at Atlanta, Georgia on March 14, 1966. The decree of annulment terminating respondent's marriage to Ella Lucille Chen (nee Self) on October 26, 1965 was entered in evidence as Exhibit R-2. The special inquiry officer concludes that in light of the decree of annulment he "cannot find that it has been established that the respondent admits the commission of acts constituting the essential elements of a crime involving moral turpitude, to-wit: bigamy."

There is of record an opinion by Judge Brown of the United States District Court for the Western District of Tennessee granting a writ of habeas corpus and specifically providing "that the order of the special inquiry officer, under date of May 26, 1964, should be reinstated" (*Chen v. District Director*, No. C-650144, U.S.D.C.W.D. Tenn., August 13, 1965). The court states in its opinion that with respect to voluntary departure "we think there
[4] is substantial evidence in the record to support the determination by the special inquiry officer that (respondent) was entitled to voluntary departure . . . More specifically, there is evidence in the record to support the finding that he was not guilty of any conscious fraud in contracting the second marriage; and therefore, even though he was involved in a bigamous marriage, that would not be immoral conduct within the voluntary departure provision."[1]

Despite the foregoing, the special inquiry officer concludes that the court made no specific finding that the respondent was not guilty of a conscious fraud in contracting his second marriage to a United States citizen (p. 11, SIO opinion) The special inquiry officer also states in his opinion that since nothing of significance has occurred in respondent's case since this Board ordered his deportation in August of 1964 except the annulment of respondent's second marriage, he (special inquiry officer) concurs in the action taken by the Board and will deny the present application for adjustment of status as a matter of administrative discretion. As another reason for not exercising

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[1] It was an appeal from this decision that was pending before the Court of Appeals for the Sixth Circuit which was referred to in the Board's order of April 28, 1966.

the Attorney General's discretion in respondent's case, the special inquiry officer refers to the fact that the respondent's wife and seven of their eight children, five of whom are minors, reside in the Philippine Islands and it is "the function of the immigration laws . . . to keep the family unit together . . . *a fortiori*, the combination of the two separate grounds impels the denial of the application for adjustment." (p. 12, SIO opinion)

[5] Counsel argues that the finding and order of the United States District Court is res judicata as to the issue of conscious fraud of the respondent in contracting his second marriage and that it was error on the part of the special inquiry officer to use this issue as one of the reasons for denying the respondent's application for adjustment of status. Counsel also argues that it was error on the part of the special inquiry officer to inject the issue of maintaining the family unit as a reason for denying relief in respondent's case because there is nothing in the immigration laws which precludes the respondent from petitioning for immigration visas for his family once his status is adjusted to that of a permanent resident alien.

Counsel also points to the fact that the special inquiry officer gave no consideration to the substantial contributions which the respondent is making to the welfare of the United States in view of the critical need of teachers with his educational and academic attainments in small church-related colleges. Counsel asserts that the respondent with his qualifications could hold a lucrative position with a large university but has chosen to devote his efforts to the education of Negro youths at an institution that can only afford to pay him a modest salary.

We have carefully reviewed the entire record together with the briefs submitted and the arguments of opposing counsel. The order of the United States District Court is in our judgment conclusive with regard to the issue as to whether the respondent was guilty of "conscious fraud" when he contracted a second marriage to a United States citizen. We conclude therefore that this element is not a bar to a finding that the respondent is a person of good moral character. We find no error on the part of the special inquiry officer in denying the respondent's application for adjustment of status as a matter of administrative discretion based on the premise that it is a function of the immigration laws to keep family units together.

[6] According to the record before us the respondent has shown little concern for his family in the Philippine Islands since his arrival in 1961. We find no evidence that he has supported his family during his residence in the United States. It is alleged that he earns a modest salary. According to the respondent's Federal income tax return for 1963 he earned a total of $2,300. There is no evidence before us that the respondent is in a position to finance the immediate passage of a family of eight from the Philippines to the United States. Furthermore, the record of the respondent's employment and his persistent efforts to adjust his immigration status raises a doubt as to the bona fides of respondent's entry as a nonimmigrant visitor for pleasure. We have consistently held that a preconceived intent to establish permanent residence via the nonimmigrant route[2] is a factor to be considered in denying relief under Section 245 of the Immigration and Nationality Act. We will affirm that portion of the special inquiry officer's order denying the respondent's current application for adjustment of status

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[2] Int. Dec. 1466, 1514, 1588.

under Section 245 of the Immigration and Nationality Act solely on the basis of the reasons set forth above.

The special inquiry officer in his decision of May 26, 1964 found no evidence of fraud on the part of the respondent in his attempt to adjust his status on the basis of a purported marriage to a United States citizen. He ordered voluntary departure in lieu of deportation. We found the respondent statutorily ineligible for voluntary departure under the provisions of Section 101(f) of the Immigration and Nationality Act in our decision of August 21, 1964. The decision of the United States District Court for the Western District of Tennessee removes the element of "conscious fraud" in the contracting of respondent's marriage and the court stated in its opinion: "There is substantial evidence in the record to support the determination by the special inquiry officer that (respondent) was entitled to voluntary departure . . . an order should be

[7] entered granting . . . a writ of habeas corpus and specifically providing that the order of the special inquiry officer under date of May 26, 1964, should be reinstated." (*Chen v. Foley*, C.A. No. C 65-144, U.S.D.C. W.D. Tenn., August 13, 1965)

We agree with the court that absent the element of "conscious fraud" there is nothing in this record adverse to the respondent's moral character. Under the circumstances, we will reinstate the grant of voluntary departure by an appropriate order.

ORDER: The order entered by the special inquiry officer on October 10, 1966 directed to the denial of the alien's application for adjustment of status is hereby affirmed. The order entered by the special inquiry officer on October 10, 1966 providing for the alien's deportation is hereby withdrawn.

IT IS FURTHER ORDERED that the alien be permitted to depart from the United States voluntarily without expense to the Government, to any country of his choice, within such period of time and under such conditions as the officer in charge of the district deems appropriate.

IT IS FURTHER ORDERED that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed.

IT IS FURTHER ORDERED that the appeal of the alien be and the same is hereby dismissed.

Chairman

APPENDIX "C"

[1]

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
814 Federal Building
Memphis, Tennessee 38103

NOTICE OF APPROVAL OR REVALIDATION
OF VISA PETITION

File Number: A1 501 374

Date: August 23, 1967

Date Petition filed: August 23, 1967

Date to which Petition
is valid: August 22, 1968

Classification: Third Preference

Mr. Robert L. Owens, III
President of Knoxville College
901 College Street, North West
Knoxville, Tennessee 37921

Dear Sir:

Please note the items below which are indicated by "X" marks concerning the visa petition filed by you in behalf of Paul Ching-Szu Chen.

* * *

[X] The petition has been approved. No notice of approval of the petition has been sent to a United States Consulate or port of entry as it has not been indicated that the beneficiary (ies) will apply for visa(s) or for admission to the United States.

* * *

Appendix "C" - Notice of Approval of Visa Petition

(Items omitted were not pertinent.)

☐ REMARKS

CC: Dr. Paul Chinn
1634 Dunbar St.
Knoxville, Tenn.

Very truly yours,

/s/ Raymond E. Bunker
Raymond E. Bunker
Officer in Charge

SUPREME COURT, U. S.

FILED

JUL 25 1968

JOHN F. DAVIS, CLERK

No. 241

In the Supreme Court of the United States

OCTOBER TERM, 1968

PAUL CHING-SZU CHEN, PETITIONER

v.

R. WILLIAM FOLEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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Public Law 87-885, Section 2, 76 Stat. 1247	5

In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 385 F. 2d 929.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1967. A petition for rehearing was denied on January 31, 1968. Mr. Justice Stewart ex-

tended the time for filing a petition for a writ of certiorari to June 29, 1968, and on June 27, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1255, provides in pertinent part:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
>
> * * * *

QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying the petitioner's application for adjustment of status from non-immigrant to immigrant.

STATEMENT

Unlike the legal issue tendered, the facts in this case are somewhat complex. Petitioner is a native

and citizen of China (R. 178, 173, 172, 166).[1] He is married and the father of eight children. His wife and seven of his children reside in the Philippine Islands and a daughter lives in China (R. 170, S. R. 48).

On December 10, 1960, Paine College in Augusta, Georgia, on the basis of petitioner's membership in a profession, requested the Immigration and Naturalization Service to grant him a visa according him first preference status under the quota for Chinese persons (R. 157). The service approved the petition and forwarded it to the United States Embassy at Manila where petitioner then resided (R. 157). Petitioner did not obtain an immigrant visa, however, possibly because a first preference visa was not then available under the quota for Chinese persons.

Instead, he applied for and received a non-immigrant visitor's visa, allegedly so that he could sightsee in Hawaii for three weeks (R. 174). Petitioner actually entered the United States, on May 24, 1961, at Seattle, Washington, as a non-immigrant eligible to remain only until November 23, 1961 (R. 170). A few months after arriving in this country as a visitor, petitioner accepted a teaching position at Paine College without obtaining the required authorization from the Service (R. 170). Shortly before the expira-

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[1] References are to the initial certified administrative record ("R."), the supplemental certified administrative record of the reopened deportation proceedings ("S.R.") and to appellant's appendix ("App.") filed in the court of appeals. The record and supplemental record of the administrative proceedings have been filed by the petitioner. We are lodging a copy of petitioner's appendix in the court of appeals together with this brief.

tion date of his authorized stay as a visitor, petitioner was notified by the Service that his employment would prohibit the Service from extending his stay as a nonimmigrant, but that Paine College could file another first preference petition if it so desired. The letter also informed petitioner that his authorized stay would be extended until January 26, 1962, the expiration date of the original petition filed on his behalf by Paine College (R. 112). On November 10, 1961, Paine College requested revalidation of its petition for a first preference visa for petitioner (R. 156).

On January 1, 1962, while the college's request for revalidation of petitioner's visa was still pending, petitioner married Ella Lucille Self, a native-born United States citizen (R. 182). She then filed with the Service a visa petition seeking nonquota immigrant status for her new husband. The visa petition was supported by letters addressed to petitioner from relatives and friends in Hong Kong and China reporting that his first wife had died suddenly in China while on a trip to visit her sick mother (R. 183-190).

In anticipation of approval of his wife's visa petition, petitioner filed an application to adjust his status to that of a permanent resident (R. 170-171a). However, petitioner's wife withdrew her visa petition and the visa petition filed by Paine College expired without being revalidated. The District Director therefore denied the application for adjustment of status (R. 166).

Following that denial the Service notified petitioner that his authorized stay would expire on

March 15, 1963.[2] When he failed to depart, the Service commenced deportation proceedings against him, charging that, after entry as a visitor, he had remained longer than permitted (R. 166).

Deportation hearings began on April 1, 1963, and concluded a year later. During the early stages of the hearing petitioner filed another application for adjustment of status based upon a 1962 amendment to the Immigration and Nationality Act (R. 48). By virtue of that amendment, certain aliens were accorded nonquota status if they were on April 1, 1962, the beneficiaries of approved visa petitions, and if they were, at the time of application for adjustment of status, found to have retained their status as established in their approved petitions. Public Law 87-885, Section 2, 76 Stat. 1247.

On May 26, 1964, the special inquiry officer held petitioner to be deportable as charged. He denied petitioner's application for adjustment of status under Section 245 of the Act on the ground that petitioner failed to meet the statutory requirement of having an immigrant visa immediately available to him. He found that, since petitioner had left his employment with Paine College in June 1962, he had not maintained his first preference status and, therefore, was not eligible for the benefits of the 1962 amendment.

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[2] On January 23, 1963, Ella Self reinstated her visa petition on behalf of petitioner (R. 118-119). Through an investigation in the Philippines, the Service discovered that petitioner's first wife was in fact still alive, and Ella Self's petition was accordingly denied (R. 151). She subsequently obtained an annulment of her marriage to petitioner (S. R. 85-86).

The officer authorized petitioner to depart voluntarily in lieu of deportation (R. 44-54).

Both petitioner and the Service filed appeals (R. 28, 36), and on August 21, 1964, the Board of Immigration Appeals affirmed the finding of deportability and the denial of an adjustment of status under Section 245 of the Act. The Board denied petitioner the privilege of voluntary departure on the ground that he lacked good moral character since he knew he was contracting a bigamous marriage with Ella Self (R. 14-20).

Petitioner, nevertheless, entered into a contract with Rust College, Holly Springs, Mississippi, to teach there through June 1, 1965 (App. 44a-45a). On September 12, 1964, Rust College filed a first preference visa petition on behalf of petitioner (App. 45a-47a). No action was taken on this petition at that time. On June 8, 1965, petitioner was served with a notice to surrender himself within three days, for deportation to Formosa (R. 10).

On June 10, 1965, petitioner sought review of the Board's action by a petition for a writ of habeas corpus in the United States District Court for the Western District of Tennessee. On August 13, 1965, the district court affirmed the Board's denial of adjustment of status but reinstated the special inquiry officer's allowance of voluntary departure. The court determined that the evidence did not prove conscious fraud with respect to petitioner's "marriage" to Ella Self (App. 7a-9a). On September 30, 1965, the first preference petition filed a year earlier by Rust College was denied (S.R. 65-67). Meanwhile, petitioner

appealed the district court's decision to the court of appeals (App. 2a).

While petitioner's appeal was pending, the Act of October 3, 1965, 79 Stat. 911, became effective. This Act amended Section 203 of the Immigration and Nationality Act, making it easier for a professional to qualify for approval of a visa petition. In particular, the requirement that the prospective immigrant's services must be substantially beneficial to the national economy, cultural interests, or welfare of the United States was eliminated for professionals, and professionals automatically qualified for immigrant visas to the extent of their availability within the third preference group.

Rust College, seeking to take advantage of the changes made by the amendment, initiated a third preference visa petition on behalf of petitioner. The petition was granted (S.R. 42, 88). Petitioner then filed a motion with the Board of Immigration Appeals seeking to reopen the deportation proceedings and his motion was granted on April 28, 1966 (S.R. 90, 87). On June 27, 1966, the court of appeals ordered that the appeal be held in abeyance until the completion of the administrative proceedings.

On October 10, 1966, the special inquiry officer again ordered petitioner's deportation and denied his applications for adjustment of status and voluntary departure. These denials, however, were based upon discretionary grounds, rather than on the unavailability of a visa or the lack of good moral character (S.R. 44-54).

Petitioner again appealed to the Board. On February 24, 1967, the Board affirmed the special inquiry officer's decision but granted voluntary departure in lieu of deportation. The board based its decision on two grounds: (1) that while it is the function of the immigration laws to keep the family unit together, petitioner's family was living in the Philippines and was unlikely to be brought here; and (2) that there was doubt as to whether petitioner had entered the country as a bona fide non-immigrant. On this latter ground, the Board noted the consistent decisions that a preconceived intent to establish permanent residence via the non-immigrant route is a factor to be considered in ruling on an application for adjustment of status under Section 245 of the Immigration and Nationality Act (S.R. 14-22, Pet. App. 34-41).

Since the Board's order terminated the reopened administrative proceedings, the court of appeals treated the appeal as an original petition to review a final order of deportation under the Act. The court found that the Board had not abused its discretion in denying an adjustment of status and affirmed its decision. The instant petition followed.[3]

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[3] On August 23, 1967, the Service approved a third preference petition filed on petitioner's behalf by Knoxville College where petitioner is currently employed as chairman of the department of psychology (Pet. App. 42-43). On June 24, 1968, petitioner, pro se, filed a motion with the Board of Immigration Appeals to reconsider its refusal to grant an adjustment of status under Section 245; the Board has not yet acted on that motion.

ARGUMENT

After a thorough examination of the facts contained in the record of the protracted administrative proceedings in this case, the court below concluded that the Board of Immigration Appeals had not abused its discretion in denying petitioner an adjustment of status under Section 245 of the Act. That conclusion is amply supported by the facts of record and no further review is warranted.

Section 245 of the Act contains two elements. The first enumerates the objective requirements which an alien must meet in order to be eligible for adjustment of status; the second calls for the exercise of discretion by the Attorney General. When, as is true in this case, adjustment of status is denied as a matter of discretion, the role of the reviewing court is limited to an examination of the record to ascertain whether that discretion has been abused. The courts, of course, may not substitute their judgment for that of the administrative agency *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 228-229; *Cubillos-Gonzalez* v. *Immigration and Naturalization Service*, 352 F. 2d 782 (C.A. 9). Since the grant of adjustment of status to one alien lessens the opportunity for entrance by some other alien abroad who is following the normal channels for immigration, and reduces the possibility of adjustment of the status of some other applicant in this country, it is proper that administrative discretion in this area should be exercised carefully. See *Santos* v. *Immigration and Naturalization Service*, 375 F. 2d 262 (C.A. 9).

The Board was justified in concluding that the adverse factors in petitioner's case outweigh those in his favor, including the benefit of his service to inadequately staffed Negro colleges.

When petitioner came to this country he left a wife and seven children behind in the Philippines. He has not made any meaningful contribution to their support since that time. He quickly contracted an unconsummated second marriage without adequately investigating the reports of his first wife's alleged death. Petitioner argues that his relationship to his family should not be considered against him because the family may not desire to be united. He also suggests that if his application for adjustment of status is granted he might be able to bring his family here. Given petitioners' past history, however, the Board had ample basis for finding that petitioner's relationship to his family showed unworthiness for the relief of adjustment of status, and that allowing such adjustment would contravene one of the purposes of the immigration laws, namely, keeping a family together. Similarly, the Board acted properly in taking into account the likelihood of bad faith when petitioner entered this country as a non-immigrant. Such circumstances have consistently played a role in the exercise of discretion under Section 245. See *e.g.*, *Cubillos-Gonzales* v. *Immigration and Naturalization Service*, 352 F. 2d 782 (C.A. 9). It is evident, therefore, that the Board's action in this case cannot be said to be arbitrary or capricious.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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